

REMARKS

This paper is in response to the Office Action of August 24, 2004. The due date for response extends to January 24, 2005, with a two month extension.

The Office rejected claims 1-16 under 35 USC § 101, as claiming the same invention as prior US Pat. 6,375,540 (the '540 patent). The '540 patent issued to the same assignee as the present application.

The Section 101 rejection is respectfully traversed. The Examiner noted that the claims of the '540 patent are of broader scope than claims 1-16 of the present application. The Applicants respectfully disagree. The claims of the present application, although similar to the issued claims of the '540 patent, are not the same. Also, the claims of the '540 patent are not broader than the claims of the present application. For instance, the issued '540 patent independent claim 1 has the word "linearly" therein. However, the claims of the pending application do not have this limitation.

The Examiner is kindly referred to MPEP 804 II.A (Statutory Double Patenting 35 USC § 101). As noted therein, "A reliable test for double patenting under 35 USC 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970)."

Applying this test, it is possible to literally infringe the claims of the present application without literally infringing the '540 patent. And therefore, double patenting under Section 101 does not apply in this case. An obviousness double patenting rejection would be

more appropriate, but as one was not made, the undersigned will determine that option when it is presented.

If the Examiner has any questions concerning the present amendment, the Examiner is kindly requested to contact the undersigned at (408) 749-6903. If any other fees are due in connection with filing this amendment, the Commissioner is also authorized to charge Deposit Account No. 50-0805 (Order No LAM2P189C). A duplicate copy of the transmittal is enclosed for this purpose.

Respectfully submitted,
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